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CONSTITUTIONAL METHODS OF REGULATING JITNEYS

Not every business or profession is subject to general state regulation. In order to justify such legislation the health, safety, morals, or general welfare of the public must be involved.[1] Jitney transportation, by reason of the number and quality of the machines engaged therein and of the usual inexperience and financial irresponsibility of their operators, is a fit subject for the exercise of the police power in the protection of public safety.[2] The only question to be discussed is the extent and manner of regulation.[3] The police power is of indefinite and ever increasing magnitude, but subject, nevertheless, to certain rules and limitations, varying according to the character of the matter involved. The cases are in apparent confusion and there is need for classification and analysis. Three general groups are possible, the first two of which are usually recognized.[4] The third is apparently unappreciated as an additional classification, but it is submitted that it exists as a distinct group

[1] *Ex parte Hadacheck* (1913) 165 Calif. 416, 132 Pac. 584; (1918) 31 HARV. L. REV. 1034.

[2] *Public Service Commission v. Booth* (1915) 170 App. Div. 590, 156 N. Y. Supp. 140.

[3] For notes collecting the cases see L. R. A. 1918 F, 475, note.

[4] See Freund, *Police Power* (1904) secs. 643-644.

by reason of distinctions in the facts of the decisions and that recognition of it may prove helpful in the solution of a difficult problem.

The first group of cases includes those dealing with occupations affected with a public interest but not inherently harmful or dangerous. The regulation imposed upon such occupations must be reasonable and must tend to reach the result desired.[5] The statute may merely prescribe a policy, appointing a commission to make proper rules and to administer them.[6] But the statute cannot allow its whole operation,[7] or the granting and refusal of a license,[8] to depend upon the unregulated discretion of an administrative board. All proceedings before such a board must be strictly regular,[9] a litigant being entitled in all cases to hear the evidence adduced against him.[10]

Quite different from the first group just discussed are those cases involving occupations inherently harmful, or dangerous, to the public if not properly conducted; in these no citizen is absolutely privileged to engage.[11] A license to maintain a saloon[12] or to sell milk[13] may be granted and revoked in the discretion of an administrative board. And summary action may be taken if safety requires it, though at the peril of the board.[14]

These two classes are familiar enough. In addition, a third class exists, in which a private right is claimed in public property, as in a street or park. It has been customary to group such cases together with those in which the acts may be prohibited. But they may fairly and accurately be regarded as of a distinct type. To this type the jitney problem belongs. The privilege of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and

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[5] *State v. Porter* (1920) 94 Conn. 639, 110 Atl. 59; *Ingham v. Brooks* (1920) 95 Conn. 317, 111 Atl. 209; (1916) 16 COL. L. REV. 345; COMMENTS (1920) 30 YALE LAW JOURNAL, 171.

[6] *Buttfield v. Stranahan* (1904) 192 U. S. 470, 24 Sup. Ct. 349; *Interstate Commerce Commission v. Goodrich Transit Co.* (1912) 224 U. S. 194, 32 Sup. Ct. 436; *State v. Atlantic Coast Line Ry.* (1908) 56 Fla. 617, 47 So. 969; Cheadle, *Delegation of Legislative Functions* (1918) 27 YALE LAW JOURNAL, 892.

[7] *O'Neil v. Fire Insurance Co.* (1895) 166 Pa. 72, 30 Atl. 943; *Fite v. State* (1905) 114 Tenn. 646, 88 S. W. 941; *State v. Gt. Northern Ry.* (1907) 100 Minn. 445, 111 N. W. 289.

[8] *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 6 Sup. Ct. 1064; *Noble v. Douglas* (1921, W. D. Wash.) 274 Fed. 672.

[9] *Blunt v. Shepardson* (1918) 286 Ill. 84, 121 N. E. 263; COMMENTS (1919) 28 YALE LAW JOURNAL, 692.

[10] *Interstate Commerce Commission v. Louisville, etc. Ry.* (1913) 227 U. S. 88, 33 Sup. Ct. 185.

[11] See *State v. Conlon* (1895) 65 Conn. 478, 486, 33 Atl. 519, 521.

[12] *Wallace v. Reno* (1903) 27 Nev. 71, 73 Pac. 528.

[13] *Lieberman v. Van De Carr* (1905) 199 U. S. 552, 26 Sup. Ct. 144; but see COMMENTS (1919) 28 YALE LAW JOURNAL, 391.

[14] *Durand v. Dyson* (1915) 271 Ill. 382, 111 N. E. 143.

business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain. One is the usual and ordinary privilege of a citizen, while the other is special, unusual, and extraordinary. The extent of legislative power on the former is that of regulation, but the latter may be wholly denied.[15] And since it may be wholly denied, it may be granted upon any conditions that the legislature deems proper, the reasonableness of the regulation being purely a legislative question.[16]

This power may be delegated to municipalities by charter or statute.[17] To be valid, however, local regulations must be reasonable.[18] It is another question when the legislature has vested the power to grant licenses for the use of public places in the discretion of an administrative commission. To require the latter to grant licenses to jitneys when, in their opinion, the public convenience and necessity require it, is not an unconstitutional delegation of power.[19] The Supreme Court of the United States has held that the mayor of a city may be given absolute discretion in granting licenses to move buildings over the public streets,[20] and in granting licenses to speak on the public common.[21] There are, however, cases which deny this discretionary power to an official.[22] But these involve the right to use the street for parades, and not for business purposes, and they may be supported on the ground that the right of persons to assemble and parade is so well established historically that it can be regulated but not prohibited, or made dependent upon the will of any official.

The Connecticut jitney statute,[23] though vague and ungrammatical,[24]

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[15] *Ex parte Dickey* (1915) 76 W. Va. 576, 85 S. E. 781; *Schoenfeld v. City of Seattle* (1920, W. D. Wash.) 265 Fed. 726.

[16] *Hadfield v. Lundin* (1917) 98 Wash. 657, 168 Pac. 516; *Peters v. San Antonio* (1917, Tex. Civ. App.) 195 S. W. 989.

[17] *City of Memphis v. State* (1915) 133 Tenn. 83, 179 S. W. 631; *Huston v. Des Moines* (1916) 176 Iowa, 455, 156 N. W. 883; *Cummins v. Jones* (1916) 79 Or. 276, 155 Pac. 171; *McGlothern v. City of Seattle* (1921, Wash.) 199 Pac. 457.

[18] *Jitney Bus Association v. City of Wilkes-Barre* (1917) 256 Pa. 462, 100 Atl. 954; *Curry v. Osborne* (1918) 75 Fla. 85, 79 So. 293; *Parrish v. Richmond* (1916) 119 Va. 180, 89 S. E. 102.

[19] See *Public Service Commission v. Booth, supra* note 2.

[20] *Wilson v. Eureka City* (1899) 173 U. S. 32, 19 Sup. Ct. 317 (briefly digesting many cases); but see *Cicero Lumber Co. v. Cicero* (1898) 176 Ill. 9, 51 N. E. 758.

[21] *Davis v. Massachusetts* (1897) 167 U. S. 43, 17 Sup. Ct. 731; *contra, State v. Coleman* (1921, Conn.) 113 Atl. 385.

[22] *Matter of Frazee* (1886) 63 Mich. 396, 30 N. W. 72; For other similar cases see Freund, *op. cit.* secs. 643-644.

[23] Pub. Acts, 1921, ch. 77.

[24] The words of the statute which are important in this connection are as follows: "Sec. 3. No person . . . . shall operate a jitney until the owner thereof shall

has recently been held constitutional in the case of *Lane v. Whitaker* (1921, U. S. D. C. Conn.) 65 N. Y. L. JOUR. 149, the court construing it as requiring the Public Utilities Commission to hold hearings and to grant licenses if, and whenever, in their opinion, public convenience and necessity so require. This interpretation, while resting on inference only, is perhaps justified by the rule that a statute must be construed so as to be constitutional whenever it is possible to do so. It seems questionable whether by the wording of the statute this interpretation was actually justified, especially when it is considered that the provision for revocation seems not to require a hearing.[25] The Supreme Court of Connecticut has recently held, in *State v. Coleman*,[26] that an unregulated authority to grant licenses to speak in a public park may not be given to an administrative official. Under the authority of this case, if it be considered that an unguided discretion is vested in the commission either to grant or to revoke licenses, then this statute must be held unconstitutional. And federal courts should take into consideration the Connecticut authorities when passing on the constitutionality of a Connecticut statute. On the other hand, the doctrine of the Federal

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have obtained a certificate from the Public Utilities Commission specifying the route . . . . and that the public convenience and necessity require its operation over such route. . . . . Upon receipt of . . . . application said commission shall fix a time and place of hearing thereon . . . . and public hearing held thereon. (note that this clause has no grammatical connection with what precedes it). . . . The commission may amend or revoke any certificate." "Sec. 7. Any person . . . . aggrieved by any act or order of the . . . . commission may appeal to the Superior Court in the same manner and with the same effect" as is provided in Rev. Sts. 1918, sec. 3828.

[25] On this point, however, the section providing for an appeal may have a considerable bearing, for it seems probable that, in providing for an appeal, the legislature must have intended the commission to hold hearings. The court, in the instant case, seems to have considered this section as a general panacea. But it is submitted that, outside of its influence upon the interpretation of the statute, it has no effect whatever. While its words seem to indicate that the case, on appeal, shall be transferred bodily to the Superior Court, and the judge of that court vested with the same discretion as was given the Commission, still, its operation is otherwise, for it has been held that, where administrative questions are involved, the Superior Court may not try the question *de novo*, but must first be satisfied by the appellant that the commissioners acted irregularly. *Stevens v. Connecticut Co.* (1912) 86 Conn. 36, 84 Atl. 361. This is the rule even when no appeal is expressly given. The courts cannot review the discretion which has by law been vested in an administrative board. *State v. Board of Dental Examiners* (1905) 38 Wash. 325, 80 Pac. 544. But they can interfere if an application is arbitrarily rejected without reason given (*Amperse v. City of Kalamazoo* (1886) 59 Mich. 78, 26 N. W. 222); or if the discretion is clearly shown to have been abused. *Board of Dental Examiners v. People* (1887) 123 Ill. 227, 13 N. E. 201; *Thompson v. Koch* (1895) 98 Ky. 400, 33 S. W. 96. An express statutory declaration that the decisions of the board shall be final violates due process. *Chicago, M. & St. P. Ry. v. Minnesota* (1890) 134 U. S. 418, 10 Sup. Ct. 702.

[26] *Supra* note 21.

Supreme Court cases already referred to,[27] if carried to its logical conclusion, would sustain the statute. In connection with the *Coleman* case it will be noted that the authority upon which the court relied included only cases which belong to the group of ordinary enterprises mentioned above as class one and which, it is believed, therefore, were not controlling. While the case may appeal to one's sense of justice, nevertheless, it is submitted that this is a legislative, and not a judicial question, for there can be no property right in the use of a public place for private gain.[28]

TARDY PRESENTATION OF CHECKS BY SENDING FROM PAYEE'S BRANCH TO HEAD OFFICE

The present danger of bank failures should draw attention to an interesting variation of the "stale check rule" recently discussed in *Republic Metalware Co. v. Smith* (1920) 218 Ill. App. 130. Ordinarily, one receiving a check drawn on a bank in the same city, if he would preserve his rights against the drawer in case the bank fails, must present the check for payment not later than the following business day,[1] twenty-four hours being considered a reasonable time. But what constitutes a reasonable time when paper is originally sent to more distant points is less easy to settle and in consequence not so certainly established.[2]

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[27] *Supra* notes 20 and 21.

[28] *LeBlanc v. City of New Orleans* (1915) 138 La. 243, 70 So. 212.

[1] *Grange v. Reigh* (1896) 93 Wis. 552, 67 N. W. 1130; *Gordon v. Levine* (1907) 194 Mass. 418, 80 N. E. 505. Few checks are now presented by the payee, but they are generally deposited in his own bank. And since the great bulk of city checks are collected through clearing houses, a method now legally recognized, one wonders whether a special rule of reasonableness should not be applied, allowing an extra day in the case where the payee, receiving a check too late to deposit it the same day, deposits it the next, and it is presented through the clearing house the day after. This is the rule of *Loux v. Fox* (1895) 171 Pa. 68, 33 Atl. 190; Cf. *contra, Edmisten v. Herpolsheimer* (1901) 66 Neb. 94, 92 N. W. 138, Sedgwick, J., dissenting in a vigorous opinion. See also *Willis v. Finley* (1896) 173 Pa. 28, 34 Atl. 213; *Dorchester v. Merchants Nat. Bk.* (1914) 106 Tex. 201, 163 S. W. 5; *Holmes v. Roe* (1886) 62 Mich. 199, 204, 28 N. W. 864, 866 (intimating that clearing house methods are without bearing on cases); *Alexander v. Burchfield* (1842, C. P.) 7 Man. & G. 1061, 1067 (no extra day for passing through bankers); *Zaloom v. Ganim* (1911, Sup. Ct.) 72 Misc. 36, 129 N. Y. Supp. 85, Delany, J., dissenting, affirmed without opinion (1911) 148 App. Div. 892, 132 N. Y. Supp. 1151. Why the court in the last case entered upon a learned historical discussion of clearing houses and their methods can only be imagined, for the evidence conclusively shows (case on appeal, folio 76) that the check did not go through the clearing house but was presented for payment over the counter by the old method employed before clearing houses were known.

[2] See Cent. Dig. tit. *Bills and Notes*, secs. 1095-1097. The "next day" rule applied to each step in the transaction is standard and seems to have general acceptance. See *First National Bank of Grafton v. Buckhannon Bank* (1895) 80 Md.